1995

State of Utah v. William Rick Delong : Brief of Appellee

Utah Court of Appeals

Joanne C. Slotnik; Assistant Attorney General; Jan Graham; Attorney General; David Brickey; Deputy Iron County Attorney; Attorneys for Appellee.
Floyd W. Holm; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 950296-CA
vs.	:	
WILLIAM RICK DELONG,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - - -

APPEAL FROM A CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (1995), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. 58-37a-5(1) (SUPP. 1994) IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, UTAH, THE HONORABLE ROBERT T. BRAITHWAITE, PRESIDING.

JOANNE C. SLOTNIK (4414)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

DAVID BRICKEY
Deputy Iron County Attorney

Attorneys for Appellee

FLOYD W. HOLM
Attorney for Appellant
965 South Main, Suite 3
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

ORAL ARGUMENT NOT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 950296-CA
vs.	:	
WILLIAM RICK DELONG,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - - -

APPEAL FROM A CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (1995), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. 58-37a-5(1) (SUPP. 1994) IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, UTAH, THE HONORABLE ROBERT T. BRAITHWAITE, PRESIDING.

JOANNE C. SLOTNIK (4414)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

DAVID BRICKEY
Deputy Iron County Attorney

Attorneys for Appellee

FLOYD W. HOLM
Attorney for Appellant
965 South Main, Suite 3
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 950296-CA
vs.	:	
WILLIAM RICK DELONG,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1994) and possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1) (Supp. 1994). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f)(Supp. 1994).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Was the evidence sufficient to support the jury's verdict?

A criminal conviction based on a jury verdict will only be reversed for insufficient evidence when the evidence is "so

inconclusive or so inherently improbable that 'reasonable minds must have entertained a reasonable doubt' that the defendant committed the crime." State v. Goddard, 871 P.2d 540, 543 (Utah 1994)(quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1994), governing unlawful possession of a controlled substance, provides:

> (a) It is unlawful:
>
> > (i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection . . .

Utah Code Ann. § 58-37a-5(1) (Supp. 1994), governing the possession of drug paraphernalia, provides:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

STATEMENT OF THE CASE

Following a jury trial, defendant was convicted, as charged, of one count of unlawful possession of a controlled substance (methamphetamine), a third-degree felony, and possession of drug paraphernalia, a class B misdemeanor. The trial court sentenced defendant to zero to five years in the Utah State Prison (R. 79-81). This timely appeal followed (R. 73).

STATEMENT OF THE FACTS

The facts are recited in the light most favorable to the jury's verdict. State v. Verde, 770 P.2d 116, 117 (Utah 1989). On October 27, 1994, Officer Keith Savage of the Cedar City Police Department stopped a vehicle with a broken tail light (R. 122). Defendant was driving the vehicle, and a juvenile, J.R., was in the front passenger seat (R. 130). As Officer Savage approached the vehicle, he heard defendant say, "This shit always happens to me" (R. 123). When Officer Savage asked defendant for his license and registration, defendant told him that it had been revoked (R. 122).

At this point, a second officer, Officer Holm, arrived on the scene (R. 123). After verifying with dispatch that defendant's license had been revoked, Officer Savage asked defendant if there was anything illegal in the vehicle, and

defendant "implied that there wasn't" (R. 123-24). The officer then asked for and received consent to search the vehicle (R. 124).

Defendant and J.R. exited the vehicle, and the officers patted them both down (R. 124). Although no weapons were found on defendant, Officer Holm discovered a "straw" sticking out of J.R.'s wallet (R. 124-25, 157).[1]

Officer Savage then searched the vehicle, finding various items of drug paraphernalia and other items commonly associated with drug use (R. 126-45). Specifically, he saw 10 packages of Zig Zag rolling papers in plain view just under the dash on the hump of the drive line (R. 126). He discovered another straw and a chrome set of scales on the driver's sun visor (R. 126). In a gray cloth bag beneath the passenger seat, he found more Zig Zag rolling papers, a bullet-type measuring device, two more pens converted into straws, a clothes pin, a 60-watt light bulb (altered to be used for heating methamphetamine and drawing off the smoke), another smaller bulb with one or two straws attached to it, and a bottle of Clear Eyes (R. 126-27). Near the passenger door of the vehicle, Officer Savage found a wood

---

[1] A "straw" is a pen with its internal parts removed and is often used to ingest drugs (R. 125).

marijuana pipe (R. 127). In the glove compartment, he found a blue box containing another set of scales and a pipe with a long tan tube attached (R. 127). Officer Kenneth Stapley, responding to the scene with a drug-detecting dog, also searched the vehicle and located a knife with a burnt end and a roach clip (R. 132-34, 152-53). Three of the items found in the vehicle tested positive for methamphetamine (R. 129-30, 184).

At trial, defendant's wife testified that defendant often drove the vehicle, although it was registered to her (R. 173). She did not put any of the contraband items in the vehicle, nor did she own any of those items (R. 175-77).

Sixteen-year-old J.R., who had pled guilty in juvenile court to attempted possession of a controlled substance, also testified (R. 206, 208). J.R. admitted that he had used methamphetamine on the date defendant was arrested, that defendant was his very good friend, that he did not want to see defendant go to prison again, and that he would do whatever he felt was in his friend's best interest (R. 207). J. R. testified that one of the pen straws and the roach clip found in the vehicle were definitely his, and that the brown marijuana pipe, one set of scales, and one other pen straw might be his (R. 204, 205).

Finally, defendant testified. He testified that he drove the car "just about every day" (R. 216). He denied knowing that any of the contraband was in the vehicle. He also specifically denied that any of the items were his (R. 212-15). Defendant admitted that he had smoked methamphetamine in the past, that J.R. was a close friend, and that he did not observe any of the paraphernalia on J.R.'s person when he entered the automobile (R. 217-18).

Based on this evidence, the jury convicted defendant of possession of a controlled substance (methamphetamine) and possession of drug paraphernalia.

SUMMARY OF ARGUMENT

Because defendant has failed to marshal the evidence in support of the claim that the evidence was insufficient to support his conviction, he has waived consideration of the issue on appeal.

In any event, the evidence is sufficient to support defendant's conviction. A jury is the sole judge of credibility and may not only consider the evidence before it, but also the reasonable inferences that may be drawn from the evidence. Considering the credibility of defendant and his witness, the evidence, and its fair inferences, the jury's verdict was not so

inherently improbable as to raise reasonable doubt about defendant's guilt.

ARGUMENT

POINT ONE

BECAUSE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION, HE HAS WAIVED CONSIDERATION OF THE ISSUE ON APPEAL.

Defendant asserts that the evidence was legally insufficient to convict him of possession of a controlled substance and possession of drug paraphernalia. In order for this Court to consider such a claim, defendant "must marshal the evidence supporting the . . . findings and demonstrate how the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the disputed findings." State v. Peterson, 841 P.2d 21, 25 (Utah App. 1992). If a defendant fails to marshal the evidence, the right to have the claim considered on appeal is waived. State v. Moore, 802 P.2d 732, 738 (Utah App. 1990).

In this case, defendant selectively cites only those facts that could be interpreted to bolster his argument that the evidence was insufficient to support the verdict. Thus, defendant offers as conclusive proof of the insufficiency of the

evidence the facts that defendant did not own the car, defendant was not concealing drugs or paraphernalia on his person, J.R. was concealing paraphernalia on his person, J.R. admitted that some of the items of paraphernalia may have been his, and J.R. was seated near where most of the drugs and paraphernalia were found (Br. of App at 8).

Defendant, however, ignores the evidence not supportive of his argument. He fails to consider that multiple items of paraphernalia were found in the driver's side of the car's interior and that all of the items were within the passenger compartment of the vehicle, which was under defendant's direct control (R. 261-66). He further ignores J.R.'s testimony that he would do whatever he felt was in defendant's best interests, and that he did not want to see defendant return to prison (R. 206-07). Finally, he ignores defendant's admission of past methamphetamine use (R. 218).

Defendant has thus failed to marshal all of the evidence supporting the jury's verdict. See Crookston v. Fire Ins. Exchange, 817 P.2d 789, 799-800 (Utah 1991). In addition, he has not considered any of the inferences that could properly be drawn from this evidence. To have his claim considered on appeal, defendant must demonstrate how all of the evidence as well as the

inferences that may properly be drawn from that evidence are so "inconclusive or inherently improbable that reasonable minds must have entertained some doubt that the defendant committed the crime of which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded on other grounds, State v. Walker, 743 P.2d 191 (Utah 1987). Because defendant has both failed to acknowledge all of the evidence and, further, has not considered any of the reasonable inferences arising from that evidence, his claim is waived. Moore, 802 P.2d at 738.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT DEFENDANT UNLAWFULLY POSSESSED BOTH METHAMPHETAMINE AND DRUG PARAPHERNALIA.

In any event, defendant's argument that the evidence adduced at trial was insufficient to support his conviction fails on the merits. Specifically, defendant asserts that the evidence was insufficient to prove that he was in constructive possession of the contraband found in the vehicle (Br. of App. at 5).

Under the doctrine of constructive possession, a defendant may be found to possess contraband within the meaning of section 58-37-8(2) without actual physical possession. If the State can demonstrate that the items were "subject to the dominion and

control of the accused," then the accused is in constructive possession of the items. State v. Salas, 820 P.2d 1386, 1388 (Utah App. 1991)(citing State v. Carlson, 635 P.2d 72, 74 (Utah 1981)). To establish constructive possession, the State must demonstrate that the nexus between the accused and the contraband was close enough to support the inference that the accused had "both the ability and the intent to exercise control and dominion over the drug." Id. (citing State v. Fox, 709 P.2d 316, 319 (Utah 1985). Plainly, determining whether the nexus is sufficient to support the necessary inference will be a fact-sensitive inquiry that must consider all of the circumstances surrounding each case. Constructive possession may be established by either direct or circumstantial evidence. Carlson, 635 P.2d at 74.

In defendant's view, State v. Salas, 820 P.2d 1386 (Utah App. 1991), disposes of this case. In Salas, this Court recognized that ownership or occupancy of a vehicle to which others have access is insufficient in and of itself to establish the necessary nexus for constructive possession. Salas, 820 P.2d at 1388 (citing State v. Fox, 709 P.2d 316, 319 (Utah 1985).

Other evidence must bolster the inference that defendant possessed the contraband.[2] Id.

In this case, the evidence was significantly different than in Salas and more than sufficient to support an inference of constructive possession. Defendant, who admitted to past methamphetamine use, was driving the vehicle at the time the officer stopped him and discovered the contraband (R. 122, 218). Defendant's first words were, "This shit always happens to me" (R. 123). While defendant's words give rise to a possible inference of guilt, the defendant in Salas spontaneously said, "They put it here," giving rise to the opposite inference. Salas, 820 P.2d at 1389.

While defendant did not own the car or have sole access to it, the owner testified that defendant drove the car almost daily, that she knew nothing about the contraband, that the only

---

[2] In Salas, the only other evidence that linked defendant to the drugs was hearsay evidence of a confidential informant's tip to a police officer. The informant never testified, was never identified, and his statements were admitted only to explain why the officers were looking for drugs. The statements had not been offered for the truth of the matter asserted, so they could not be used as evidence to bolster the nexus between defendant and the drugs. Salas, 820 P.2d at 1389. Because the only other evidence of a nexus between defendant and the drug was defendant's occupancy of the vehicle, this Court determined that the evidence was insufficient to support the inference that defendant possessed the drug. Id. at 1389-90.

other persons who used the car were not drug-users, and that she had not seen any contraband in the car since it had been repaired twelve days earlier (R. 173, 175-77, 180). In Salas, the owner of the vehicle did not testify.

Further, defendant had easy access to the contraband, all of which was found in the front passenger compartment of the car, within his reach. In Salas, the drugs were found in the backseat, near where a passenger had made furtive gestures. Salas, 820 P.2d at 1389. In addition, in this case, ten packages of Zig Zag papers were in plain view on the drive shaft hump between the seats, putting defendant on notice that, if the papers weren't his, someone had tampered with his car (R. 126). In Salas, the contraband was hidden from view.

The testimony of defendant's own witness also supports the inference that defendant possessed the contraband. In his opening statement, defense counsel previewed the testimony of the juvenile passenger, J.R.:

> Finally, you're going to hear from another witness by the name of Jed Redington. . . . Mr. Redington had been at the house, he had these items and put them in the vehicle while Mr. Delong was inside. Mr. Delong came outside and while he was inside he put these items under the seat and in the glove box, and then he didn't -- he didn't tell Mr. Delong that they were there.

(R. 120). J.R.'s testimony, however, failed to corroborate this preview.

J.R. testified that his participation in this matter had already been adjudicated in juvenile court, that defendant was his "very good friend," that he did not want to see defendant go to prison again, and that he would do whatever he thought was in defendant's best interest (R. 207-08). A fair inference from J.R.'s "safe" legal status and his professed allegiance to his friend is that he might be disposed to lie in order to protect his friend. If he testified that the contraband was his and that he put it in the car, defendant might well be acquitted.

Contrary to defense counsel's preview, however, J.R. testified only that he owned or maybe owned a few of the items and disavowed ownership of several other items (R. 203-05). He did not testify that he put anything in the vehicle while defendant was in the house. The fact that J.R. had a clear motivation to lie by claiming the contraband was his and did not do so only adds credibility to his testimony.

In essence, then, defense counsel set the jury up to believe an alternative theory of the case, which he then failed to pursue or prove. Thus, even if the jury was inclined to believe defendant's denials, it was left without any plausible

alternative theory to explain how the contraband came to be in defendant's car.

Defendant denied any knowledge about the numerous items of contraband in the vehicle over which he was exercising daily control. He also denied that he saw J.R. bring any contraband into the vehicle: "I'm not too observant when it comes to my passengers. I give them good faith as to know not to bring stuff like that into my vehicle because I have enough respect for other people if I had any paraphernalia of my own I wouldn't bring it into their vehicle" (R. 218-19).

In assessing the evidence, the jury had to determine the credibility of the witnesses. The law is well-settled in this regard. "Determinations of witness credibility are left to the jury. The jury is free to believe or disbelieve all or part of any witness's testimony." State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993) (citing State v. Jonas, 793 P.2d 901, 904-05 (Utah App.), cert. denied, 804 P.2d 1332 (Utah 1990).

Given that the jury apparently chose not to believe defendant's wholesale denial of knowledge about the contraband found in the car, the remaining evidence provides a sufficient nexus between defendant and the contraband to support the inference that defendant intended to exercise control and

dominion over the contraband. The jury's determination was thus not so inherently improbable as to raise reasonable doubt about defendant's guilt.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction for possession of a controlled substance (methamphetamine) and possession of drug paraphernalia.

ORAL ARGUMENT NOT REQUESTED

Based on this Court's prior development of the issues raised in this case, the State does not request oral argument.

RESPECTFULLY SUBMITTED this 2nd day of February, 1996.

JAN GRAHAM
Attorney General

Joanne C. Slotnik

JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed first-class, postage prepaid, to Floyd W. Holm, 965 South Main, Suite 3, P.O. Box 765, Cedar City Utah 84720, this 2nd day of February, 1996.

Joanne C. Slotnik